

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

September 10, 2009

No. 277617

Wayne Circuit Court

LC No. 06-010948-01

Before: O’Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1). Defendant was sentenced to three days with credit for time served for the felon in possession of a firearm conviction, three days with credit for time served for the carrying a concealed weapon conviction, and to five years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant initially contends that the trial court abused its discretion in denying his motion for an adjournment. “We review the trial court’s ruling on defendant’s request for an adjournment or a continuance for an abuse of discretion.” *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

At a hearing before the trial court, counsel stated that he met with defendant to explain the procedure for jury selection. After counsel finished explaining the procedure, defendant indicated an interest in either retaining counsel or seeking an alternative court-appointed attorney. Counsel explained that he would not petition the trial court for another court appointed attorney and that defendant would have to make the request himself. Defendant told the trial court that when he asked counsel a “hypothetical question,” counsel “blew up” at him and behaved “unprofessional[ly].” After further questioning defendant regarding the interaction, the trial court denied his request to appoint new counsel. Defendant then asserted that counsel had not been communicating with him. In response, the trial court stated that defendant should have filed a motion notifying the trial court of counsel’s lack of communication. The trial court then inquired whether counsel was prepared to proceed with trial and defendant’s attorney responded in the affirmative. The trial court then reiterated its denial of defendant’s request. When defendant again asked whether he could seek to retain different counsel, the trial court replied, “[n]ot today. You are going to trial today.”

This Court has delineated the requirements for a continuance or an adjournment:

[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence. "Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. [*Coy, supra* at 18-19 (citations omitted).]

Although defendant asserted his Constitutional rights and had not requested previous adjournments, his reasons for asserting those rights lacked merit and defendant was not diligent in asserting such rights. Although a criminal defendant "has a constitutional right to defend an action through the attorney of his choice," *People v Portillo*, 241 Mich App 540, 542-543; 616 NW2d 707 (2000), "a defendant may effectively waive his right to retain counsel of his own choice by taking advantage of appointed counsel's services," *People v Humbert*, 120 Mich App 195, 197; 327 NW2d 435 (1982), citing *People v Stinson*, 6 Mich App 648, 654; 150 NW2d 171 (1967). Defendant waived his right to obtain counsel of his choice by allowing his appointed counsel to prepare a defense on his behalf. In these circumstances the public's interest in the prompt and efficient administration of justice outweighs defendant's right to retain counsel of his choice. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003), citing *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

Further, defendant has failed to demonstrate any prejudice arising from the trial court's denial of his motion for adjournment. The jury convicted defendant of felon in possession of a firearm, carrying a concealed weapon, and felony-firearm. The parties stipulated that defendant was previously convicted of a felony and had not regained his eligibility to possess a firearm at the time of his arrest. MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-630; 703 NW2d 448 (2005). "To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original). The underlying felony establishing the elements of felony-firearm was defendant's status as a felon in possession of a firearm.

"To support a conviction for carrying a weapon in [a vehicle], the prosecution must show: (1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he was 'carrying' it." *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999), quoting *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Although later recanted at trial, in his confession defendant acknowledged that he owned the firearm and was aware that it was located beneath the driver's seat. The assessment of witness credibility is solely within the purview of the jury. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Based on defendant's confession and the evidence presented, it is highly unlikely that alternative counsel would have altered the outcome of the trial. Consequently, defendant has not demonstrated any prejudice resulting from the trial court's denial of his motion to adjourn.

Defendant also asserts that the trial court erred in admitting hearsay statements generated from a Law Enforcement Information Network (LEIN) report. Defendant must demonstrate a

plain error that affected his substantial rights. A reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Officer Owens testified that the LEIN entry corresponding to defendant's name and birth date listed an outstanding warrant in the state of Georgia. Officer Owens also revealed to the jury the LEIN search caption which stated, "armed and dangerous, violent tendencies." While more prejudicial than probative, Officer Owens' testimony regarding information from the LEIN did not constitute hearsay because it was not offered for its truth, but rather, to establish the basis for defendant's arrest. MRE 801(c). On cross-examination, counsel established that defendant did not resist arrest and that Officer Owens did not observe defendant handling the firearm.

In addition, although this portion of Officer Owens' response went beyond the scope of the prosecutor's questioning, it constituted an isolated comment that was not repeated or explored further. In *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled on other gds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), this Court discussed unresponsive testimony, stating in relevant part:

[N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. [Quotations and citations omitted.]

As such, the trial court's admission of Officer Owens' "unresponsive, volunteered" testimony did not violate defendant's substantial rights.

Defendant also argues that he was denied the effective assistance of counsel because counsel failed to object to Officer Owens' testimony. "A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Because defendant failed to seek a new trial or an evidentiary hearing, this Court's review of defendant's claim is limited to the existing record. *Id.* "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008) (citation omitted), amended 481 Mich 1201 (2008). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007) (citation omitted). "[T]o demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* Counsel's competence should not be assessed with the benefit of hindsight. *Id.*, citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Thus, the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not

guarantee infallible counsel.” *People v Grant*, 470 Mich 477, 510; 684 NW2d 686 (2004) (citation omitted); see, also, *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant contends that an objection by counsel to Officer Owens’ testimony would have changed the trial outcome. However, defense counsel’s “lack of an objection may have been trial strategy.” *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). In *Ullah*, this Court cited the Michigan Supreme Court’s decision in *People v Bahoda*, 448 Mich 261, 287, n 54; 531 NW2d 659 (1995), for the proposition that “there are times when it is better not to object [than] to draw attention to an improper argument.” *Ullah, supra* at 685. As in *Ullah*, defense counsel’s objection to Officer Owens’ response to the prosecution’s question would have further emphasized the remarks in the presence of the jury. Defendant’s confession that he owned the firearm recovered from the SUV, in conjunction with his stipulated prior felony conviction, make it reasonably probable that defendant would have been convicted regardless of counsel’s failure to object to the testimony.

In a related argument, defendant contends that his convictions and sentences for felon in possession of a firearm and felony-firearm constitute double jeopardy. “Generally, an issue is unpreserved if it was not properly raised before the trial court.” *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). Defendant did not raise an objection to his convictions and sentences on the basis of double jeopardy. Because defendant has not preserved this issue on appeal, he must demonstrate the existence of plain error that affected his substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 774.

“[T]he power to define crime and fix punishment is wholly legislative . . . . [I]f it is evident that a state legislature intended to authorize cumulative punishments, a court’s inquiry is at an end.” *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003) (citation omitted). Defendant argues that the Legislature enacted the felon in possession of a firearm statute without considering whether prospective defendants would be subject to prosecution under the felony-firearm statute. However, “[i]n enacting the felon in possession statute the Legislature presumably was aware of the four exceptions to the felony-firearm statute.” *People v Dillard*, 246 Mich App 163, 168; 631 NW2d 755 (2001). Pursuant to MCL 750.227b(1), the Legislature intended that the commission of any felony, other than: (1) unlawful sale of a firearm, MCL 750.223, (2) carrying a concealed weapon, MCL 750.227a, (3) unlawful possession by a licensee, MCL 750.227a, and (4) alteration or removal of identifying marks, MCL 750.230, would subject a defendant to an additional felony-firearm charge and sentence. *Calloway, supra* at 451-452. When the Legislature enacted the felon in possession of a firearm statute, it could have amended the list of exceptions to the felony-firearm statute, to include felon in possession of a firearm, if it so intended. *Dillard, supra* at 168.

Defendant also argues that his felon in possession and felony-firearm convictions and sentences constituted multiple prosecutions for the same offense. To be guilty of felon in possession of a firearm, one must have been convicted of a “specified felony,” pursuant to MCL 750.224f, and must have possessed a firearm before regaining the right to possess such firearm pursuant to MCL 28.424. *Perkins, supra* at 629. In contrast, “[t]o be guilty of felony-firearm, one must carry or possess the firearm, and must do so when committing or attempting to commit a felony.” *Burgenmeyer, supra* at 438. Although both offenses contain a possession element,

defendant's status as a convicted felon is an element not required for a felony-firearm conviction. In addition to possession, felony-firearm requires possession contemporaneous with the commission or attempted commission of a felony, an element not required by the felon in possession of a firearm statute. Therefore, contrary to defendant's assertion, felon in possession of a firearm and felony-firearm do not constitute the same offense. *People v Ream*, 481 Mich 223, 227-228; 750 NW2d 536 (2008).

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Cynthia Diane Stephens